Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 78-662

IN THE
SUPREME COURT
OF THE UNITED STATES

JOHN T. IRVIN Petitioner,

v.

UNITED STATES CIVIL
SERVICE COMMISSION Respondents.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES SUPREME COURT

JOHN T. IRVIN - Pro Se
3020 Del Monico Dr.
Decatur, Ga. 30032
(404) 289 3338

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The petitioner, John T. Irvin, prays that a Writ of Certiorari Issue to review the opinion and judgement of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings June 29, 1978 and August 14, 1978.

OPINIONS BELOW

The "Findings of Fact and Conclusions of Law" and "Judgment" of Charles Moye, District Judge for the United States District Court, Northern District of Georgia entered December 22, 1977, appear at Appendix "A", post, App. pp. A1-A-20.

The opinion of the United States Court of Appeals for the Fifth Circuit, June 29, 1978 is stamped "Do Not Publish".

The Order of United States Court of

Appeals for the Fifth Circuit denying Petition for Rehearing En Banc entered August 14, 1978 appears at Appendix "B", post, App. p 1. (official National Reporter citations unavailable at this time).

JURISDICTION

Subject matter jurisdiction for the court of first instance is based upon the Privacy Act, 5 U.S.C. 552a and related provisions, and the due process clause.

The Order of the United States Court of Appeals for the Fifth Circuit, denying the Petition for Rehearing En Banc of its Opinion was entered August 14. 1978, Appendix "B" post. App. p. B1. This Petition for Certiorari was filed less than 90

days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Is Section (3)(A) CIVIL REMEDIES in 5 U.S.C. 552a THE PRIVACY ACT a peremptoray mandate to District Court to do an camera inspection and a de novo determination of exempted record systems when the exemption has been brought into question by a litigant?

2. Do the disclosure exemptions of 5 U.S.C. 552a or any other basis for administrative secrecy override my right under article V of the Constitutional Ame-

ndments to due process since I am barred from learning the basis of defendants administrative decision and it follows of all possibility of refuting it?

3. Do the disclosure exemptions of 5 U.S.C. 552a as in defendants record system CSC/GOVT-4 or any other basis for administrative secrecy override the Article I Section 9 Constitutional provision against bills of attainder?

STATUTORY PROVISIONS INVOLVED

The following section of the Privacy Act, 5 U.S.C. 552a et seq. is relevant to this petition:

5 U.S.C. 552a (K) Specific exemptions provides:

"The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1),(2), and (3), (c), and (e) of this title, to exempt any system of records within the Agency from subsections (c) (3), (d), (e)(1),(e)(4)(G), (H), and (I) and (f)of this section . . .

(5) Investigatory material compiled solely for the purpose of determing suitability, eligibility, or qualifications for Federal civilian employment."

5 U.S.C. 552a (3) (A) CIVIL REMEDIES provides:

"(3) (A) In any suit brought under the provisions of subsection (g) (1) (B) of this section, the court may enjoin the

agency from withholding the records and order the production to the complainant of any agency records imporperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency."

STATEMENT OF THE CASE

I filed an appeal and complaint with the U. S. Civil Service Commission Appeals Review Board under CFR Title 5 Part 300 Sect. 300.104 and Part 772 Subpart A Sect. 772.102. It is stated that the Board has original jurisdiction in such matters. This was my only practical avenue of appeal as the agency involved the H.E.W. was so unreceptive that it required complaints to the postal authorities to get return receipts signed for applications that were delivered in August of 1975 but not acknowledged until Oct. of 1975.

In defendants determination it failed to notify me of my right to file a Civil Action or the time limit as specified in

CFR Title 5 Sect. 713.282.

After the decision I made requests f-
or information as to my record under bo-
the Privacy Act and the Freedom of Info-
rmation Act. and determined all that de-
fendant would make available to me was
the correspondence we exchanged.

I learned I was in some grouping with
thirty others but could find out no more
about it.

Since proper documentation was lack-
ing for the decision rendered I filed Ci-
vil Action for damages under the Privacy
Act.

I was not permitted normal discovery.
Even with the Defendants attorneys coo-
peration or by a specific motion for Co-

urt examination which was not granted co-
uld I get access to vital record systems.

In Court on Feb. 16, 1977 the Court s-
uggested that I needed a Judicial Review
but permitted me to keep my Privacy Act
action for damages in the Complaint. I
tried to show the Court that access to t-
he exempted systems of defendants system
of records was necessary. See transcript.

I filed the necessary motion to amend
which was granted and filed my amended c-
omplaint on April 1, 1977. Defendant fi-
led his out of time Motion to Dismiss or
for Summary judgment and judgment was re-
ndered in defendants favor. That judgm-
ent was the subject of this appeal and
the petition for rehearing en banc. Wh-

ere the peremptory mandate to do a denovo determination of the record exemption and bill of Attainder record system was more fully set forth.

On adverse decision I am filing this petition for a writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court is the only court competent to adjudicate the key question in this case; the lesser courts being disqualified by reason of personal interest.

The Supreme Court is the only Constitutional court. All the lesser courts are creations of Congress. Congress in the PRIVACY ACT 5U.S.C. 552a in CIVIL REMEDIES (3)(A) laid a duty on the District court to me.

CONGRESSIONAL INTENT

> "Since access to a file; is the key to insuring the citizen's right of accuracy, completeness, and relevancy, a denial of access affords the citizen the right to raise these issues in court. This

would be the means by which a citizen could challenge any exemption from the requirements of (the Act). (Senate Report 93-1183, p.82).

In conducting its review, (The court is required to determine such matters de novo' mloe and the burden of proof is upon the agency to sustain the exemption." (House Report 93-1416, p.17) In view of the sensitivity of some of the records to which access may be sought, the court, in examining those records may do so in camera. "A person seeking access to a file which he has reason to believe is being maintained on him for the purposes of determining its accuracy and completeness, for example, or to take advantage of the rights afforded him ...could raise the question of the propriety of the exemption which denies him access to his files. In deciding whether the citizen has a right to see his file or to learn whether the agency has a file on him, the court would

> of necessity have to decide the legitimacy of the agency's reasons for the denial of access, or refusal of an answer. The Committee intends that any citizen who is denied a right of access under the Act may have a action, without the necessity of having to show that a decision has been made on the basis of it, and without having to show some further injury, such as loss of job or other benefit, that might stem from the denial of access." (Senate Report 93-1183, p.82)

This peremptory mandate directly effects the power and perogatives of the lesser courts and so disqualifies them if I am to have due process.

In short this is a case of my rights against the lesser courts. To have the lesser courts sit in judgment in such a case is kangaroo. Look at my "motion for

court examination in camera of certain records pursuant to Privacy Act" filed in District Court Aug. 16, 1976 that is an exhibit in my petition for a Rehearing En Banc. The question is and has been before the court like raw meat on the floor. To ignore it as the lesser courts have done is the same thing as ruling against me, as it has the same effect. The Supreme Court because of the position as a Constitutional Court, rather than a creation of congress, is the only court qualified to rule on this case and give me due process.

2. Regardless of the answer to question one I have not had due process. At no point in the administrative process or

the judicial process did I get to see the evidence that was the basis of defendants decision or have a chance to refute it.

Has the administrative branch achieved a quiet revolution and we now have a county where administrative rules take procedence over constitutional rights?

For example, as I called to the courts attention, I have disabled veterans' status. See defendant's (under seal) exhibits.

According to the rules there was supposed to be posted in writing in my records an explanation of why I did not get the job.

I pointed out to the court what record systems (exempted of course CSC/GOVT-3 and CSC/GOVT-5.) this was in. I have not seen this record nor any of the records in the exempted systems. Look at defendants exhibits. The record left open to disclosure is nothing more than a stripped down correspondence file, with no evidence, only conclusions on defendant's part in it. This is not due process.

Before District Court had me amend my complaint to include a judicial review my case was based only on the Privacy Act and the Due Process Clause, not a judicial Review. District Court's opinion deals wi-

th its part of the case, not mine.

I am not unmindful that this particular district is very busy. During the pendency of the case the trial judge deplored the fact, to the press, that his case load approached 450 cases while the national average was more like 250 cases and the effect this and the special arrangements mandated for criminal cases would have on the civil cases. This is not my problem. Have I been shortchanged because the court is too busy? You had best read my complaint if you want to know what my case is about rather than the opinion.

The Privacy Act gives you damages, if the federal agency can't show its reco-

rds back up its decision. Due process demands that you get to see the evidence and a chance to refute the evidence. With the records involved fragmented into several exempted record systems I felt something had to give. Either defendant had to cough up the exempted records to give me due process or had to pay the the price for keeping the records from me by giving me damages.

I got neither. District Court did not give me normal discovery so that we could see what the rules were and if they had been followed. The court is mum on what if anything it saw. I saw nothing. No discovery, no record systems, no nothing.

The reason the due process clause is in the bill of rights is that the people had a mistrust of the federal establishment. I am entitled to due process. I have not had it.

3. Mr. Bell, the attorney general, got national press coverage when he defied a court order in another matter, because he felt the protection of "government snitches" was of such great importance he wanted to litigate it as soon as possible. Please let us accomodate Mr. Bell.

Look at 5 U.S.C. 552a (K) Specific Exemptions. This allows a record system to be made secret and the Federal agency doesn't even have to tell you, you are in it. Now look at (5) under the exemptions.

"Investigatory material compiled solely for the purpose of determining suitability" is another way of saying bars to federal employment. By what authority? Not from Congress certainly.

The Supreme Court has regarded such bars to federal employment since the famous Test Oath Cases (Ex parte Garland, 4Wall.333(1878) Cummings v. Mo., 4Wall. 277) right after the Civil War as inflicting punishment without a judicial trial, bills of attainder, prohibited by the constitution.

The administrative branch can bar you from federal employment and not even tell you. Look at the record. Defendant

has thrown a lot of sand in the air but they have never stated that I was not in this CSC/GOVT-4 Suitability/Bars to federal employment system. Look at the basis for secrecy in the rest of the applicable record systems. (Defendant fragmented the record up in little pieces, you know, so that you have to hunt through a "hurrah's nest" to even identify the pieces).

The bars go beyond defendant agency for who can guess where they originated. In the H.E.W. where the application was filed? Or perhaps another agency regretting the demise of lese majeste and substituting the bureaucratic hex of a bar to employment in your record. Even a bu-

rglar couldn't find out. Only the court can make the executive branch cough it up.

What price secrecy? In part one I have shown the law made to protect me in just such situations as this has been perverted in the name of secrecy to do just the opposite. In part two this secrecy is greater than my right to due process under the bill of rights and in number three it is greater than the constitutional provision against bills of attainder.

CONCLUSION

This case presents the court with the opportunity to put the judicial house in order as to court duty in this critical area of access to records. As I have shown, congress thought access was the key in the privacy act and was required.

Mr. Bell, the attorney general, apparantly attaches the greatest importance to administrative secrecy. The Supreme Court is the only forum competent to decide.

This case shows how administrative secrecy conflicts with the constitutional rights of an ordinary citizen in a matter free of the pressures of publicity.

On the basis of the foregoing, it is

respectfully requested that the court issue a Writ of Certiori in this case.

Respectfully submitted:

John T. Irvin, pro se

3020 Del Monico Dr.

Decatur, Ga. 30032

(404) 289 3338

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN T. IRVIN	
v.	C76-289A
UNITED STATES CIVIL SERVICE COMMISSION	

ORDER OF COURT

The plaintiff, pro se, has filed this action, as amended, under the Equal Employment Opportunity Act of 1972, 42 U.S.C. #2000e-16, the Administrative Procedure Act, 5 U.S.C. #701 et seq., and the Privacy Act, 5 U.S.C. #552a(g)(1). He alleges that defendant United States Civil Service Commission (CSC) failed to maintain with complete accuracy and denied him access to and a chance to copy his ad-

ministrative complaint and file which was compiled during the course of Irvin's appeal to the CSC of an HEW decision not to hire him. The case is presently before the Court on defendant's motion to dismiss for lack of jurisdiction or, in the alternative, for summary judgment.

The facts of this case appear to be as follows: On July 7, 1975, HEW, through the Social Security Administration, advertised an opening for the position of Social Insurance Claims Adjuster. On the closing date of July 16, 1975, plaintiff applied for the position. He was notified on August 7, 1975, that he had not been selected

for the job and he thereafter appealed this decision, along with HEW's failure to hire him on two previous occasions, to the Appeals Review Board of the CSC (Board). Plaintiff was notified by the CSC that the Board had only limited jurisdiction in this matter and that the proper avenue of appeal would be directly to the hiring agency. On November 26, 1975, the Board ruled adversely to plaintiff and it set forth the findings of fact and conclusions of law which supported the decision. This was sent to plaintiff. On December 1, 1975, plaintiff requested a copy of the record upon which the Board had based its decision; thereafter, on December 15, 1975, the Board sent to pla-

intiff a copy of his appeal record. Plaintiff challenged the copy sent to him and asserted the record was incomplete. The Board considered this objection as a Privacy Act Appeal, on January 19, 1976, the Executive Director of the CSC for Freedom of Information and Privacy advised plaintiff that a copy of his records were available for inspection upon request and a short time later he informed plaintiff that the same was being forwarded to the Atlanta office for the convenience of plaintiff. However, plaintiff never responded and did not avail himself of the opportunity to inspect the documents. On February 12, 1976, plaintiff filed this complaint in federal

court alleging that the CSC had willfully and intentionally failed to compile a complete record in his case and thereby denied him fairness in the Board's deposition of his appeal. Plaintiff apparently bases this action on the contention that three paragraphs of his administrative complaint were "unaccounted for" in the administrative record.

Initially, the Court notes that defendant's motion is not timely. See Local Rule 92.0. That rule provides:

> Time for Filing Motions. Motions for summary judgment in a given case under Rule 56 of the Federal Rules and motions to dismiss under Rule 12 of the Federal Rules shall not, unless otherwise ordered by the Court, be entertained unless said motions are made, filed and served upon the opposing party within ten days aft-

er the mailing by the clerk of a p-
retrial notice of said case.

The purpose of Rule 92.0 is to preve-
nt a party from disrupting this Court's trial calendar and delaying the case by filing a frivolous motion shortly befo-
re trial. It is apparent that in a di-
strict such as this, if a case is tak-
en from an upcoming civil trial calen-
dar to decide a motion for summary jud-
gment, the final resolution of that ca-
se could be delayed several months. Ho-
wever, those consideratons do not exist in the present situation. Although pr-
etrial statements have been filed, this case has not yet been set for trial. Mo-
reover, defendant's motion is not friv-

olous and if it is successful, it would dispose of the entire case immediately and eliminate the need for a trial. For these reasons the Court concludes that it is in the interest of justice to waive t-
he time limitations of Rule 92.0 for the purpose of entertaining defendant's mot-
ion.

Defendant first asserts that the com-
plaint, in so far as it is based on the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16, must be dismissed be-
cause this Court lacks jurisdiction to e-
ntertain such a claim. Defendant's mot-
ion in this regard is well taken. As is shown by the Administrative Record, pla-
intiff raised a similar claim before the

Board although there, as here, he presented no evidence to support the charge that he was discriminated against on the basis of race, national origin or sex. Plaintiff further failed to allege any specific acts or types of discrimination involved. The Board resolved this issue against plaintiff and issued a decision on November 26, 1975. However plaintiff did not file suit until February 12, 1976, at least 73 days after plaintiff received a copy of this decision.[1/]

The Equal Employment Opportunity Act of 1972, which is the exclusive remedy for both federal employees and applicants for

1/ In a letter to the CSC dated December 1, 1975, plaintiff refers to the decision and requested a copy of his record, thus indicating that he had received a copy of the decision.

federal employment, 42 U.S.C. 2000e-16(a) Brown v. General Services Administration, 425 U.S. 820 (1976), provides that any civil action alleging discrimination in federal employment must be filed in United States District Court within 30 days of receipt of the Commission's action. 42 U.S.C. # 20003-16(c). The Fifth Circuit has interpreted this to be a jurisdictional requirement and thus a complaint filed after the running of such 30 days must be dismissed. Eastland v. Tennessee Valley Authority, 547 F.2d 908 (5th Cir. 1977). This is true regardless of the CSC's failure to advise a plaintiff of this statutory requirement. 547F.2d at 913, 914. Accordingly, defendant's motion, insofar

as it seeks to dismiss that portion of the complaint which is based on the Equal Employment Opportunity Act of 1972, is hereby GRANTED.

Defendant next moved to dismiss that portion of the complaint which asserts that the jurisdiction of this Court is based on the Administrative Procedure Act, 5U.S.C. #701 et seq. The law is now settled that the Administrative Procedure Act does not afford a separate grant of subject matter jurisdiction permitting federal judicial review of agency action. Califano v. Sanders, 430 U.S. 99 (1977). However, this Court finds that plaintiff, who is bringing this action pro se, could have properly alleged the jurisdiction

of this Court to review the agency action by citing to federal question jurisdiction. 28 U.S.C. #1331. For this reason, defendant's motion to strike the allegation of jurisdiction based on the Administrative Procedure Act is hereby GRANTED, but the Court retains jurisdiction based on section 1331.

Defendant next moves for summary judgment affirming the decision of the Appeals Review Board of the CSC. The Administrative Record establishes that plaintiff presented his appeal to the CSC on August 11, 1975, and that thereafter he was afforded ample opportunity to supplement his appeal with any evidence he deemed relevant. Further, plaintiff was informed th-

at the better appeal procedure was directly to the hiring agency. Despite this, plaintiff failed to present any evidence beyond the vague allusion to impropriety in his not being selected by HEW. On November 26, 1975, the Board dismissed plaintiff's appeal under 5 C.F.R. 300.101-300.104 since no impropriety was found and plaintiff had not articulated any particular employment practice which was proscribed by those regulations. Moreover, the Board ruled that plaintiff had failed to properly pursue his appeal before the employing agency as required by the regulations. As to plaintiff's allegations of improprieties regarding past failures to hire him, the Board concluded that any issues to be resolved were untimely, and that plaintiff never averred that he applied for those vacancies or even qualified for the Civil Service Register.

The standard of judicial review of determination of the CSC on qualification of an employee for any given post is extremely narrow. The agency decision must be upheld unless there has been a substantial departure from applicable procedures, a misconstruction of governing legislation, or some other error going to the heart of the determination. Bookman v. United States, 453 F2d 1263 (Ct. Cl. 1972); Fagan v. Schroder, 284 F. 2d 666 (7th Cir. 1960). Absent a showing that the finding

of the CSC was arbitrary and capricious, the agency decision must be affirmed. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1970). Where, as here, a plaintiff knows of but deliberately bypasses the proper administrative procedure for processing his grievance, he has little room to challenge the dismissal of his appeal without full consideration by an agency which is without jurisdiction to hear his challenge. The record clearly shows that the plaintiff was given every opportunity to present additional evidence or pursue any alternative avenues he thought appropriate in order to have his claim fully considered. The record further shows that plaintiff did neither. The decision of the CSC to dismiss plaintiff's appeal was proper, was reached in accordance with applicable statutes and regulations and was not arbitrary or capricious. Accordingly, defendant's motion for summary judgment affirming the decision of the Appeal Review Board is hereby GRANTED.

Plaintiff next moves to dismiss that portion of the complaint which seeks recovery under the Privacy Act, 5 U.S.C. # 552a (g)(1), which provides in pertinent part:

(g)(1) Civil remedies.--Whenever any agency

. . .

(C) fails to maintain any record con-

> cerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual: . . .
>
> . . .
>
> the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Plaintiff's Privacy Act allegations are that certain paragraphs of his administrative complaint, which referred to the qualifications of those persons selected to fill the positions for which he applied, were "unaccounted for." The Court has been unable to elicit from plaintiff exactly

what he means by the allegation that these paragraphs are "unaccounted for." If he means that those paragraphs were omitted from the Administrative Record, clearly this is untrue. See Administrative Record, Defendant's Exhibit A-57. If plaintiff means that these paragraphs were not answered by the Appeals Review Board and thus the record is incomplete, such a use of the Privacy Act requirements to attack the findings of an agency is indeed novel. The Court has already found that the decision of the CSC was proper. That decision by the CSC was based on a lack of jurisdiction and therefore there was no requirement that the CSC consider plaintiff's substantive challenge to the

qualification of those who were chosen over him. The Privacy Act only requires that an agency maintain that record which is necessary to assure fairness in any determination relating to plaintiff. Such a record was kept in this case despite the fact that it lacked a point by point response to the substantive challenges by plaintiff. Plaintiff himself is responsible for not receiving a decision on the merits of his allegations since he refused to follow the proper procedure for review of his complaint.

Moreover, plaintiff cannot base his Privacy Act challenge on the more traditional allegation that he was denied

access to his file. The Administrative Record clearly shows that plaintiff had ample opportunity to review his file if he had chosen to do so. Plaintiff's final concern with regard to his record is that certain symbols were used in his appeal file of which he is unfamiliar. The Court finds that an affidavit filed by a CSC Freedom of Information Act specialist has fully explained those symbols to the Court and to plaintiff. For these reasons, the Court finds that plaintiff's recognizable Privacy Act allegations are now moot and therefore defendant's motion to dismiss that portion of the complaint is hereby GRANTED.

In conclusion, defendant's motion to

dismiss all parts of the complaint, except that which seeks review of the administrative decision, is hereby GRANTED. Further, defendant's motion for summary judgment affirming the agency decision is hereby GRANTED.

SO ORDERED, this 21 day of December, 1977.

/s/ Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHN T. IRVIN Plaintiff-Appellant	)	
v.	)	No. 78-1186
UNITED STATES CIVIL SERVICE COMMISSION Defendant-Appellee	)	

Appeal from the United States District Court for the Northern District of Georgia

(August 14, 1978)

Before Thornberry, Godbold and Rubin. Circuit Judges.

PER CURIAM: Appellants Petition for rehearing en banc is hereby denied.